No. 152.

Brief of Tarsney for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE CITY OF DETROIT,
WILLIAM C. MAYBURY, Mayor, and
CHARLES FLOWERS, Corporation Counsel,
Defendants and Appellants,

vs.

DETROIT CITIZENS' STREET RAILWAY COMPANY,
Complainant and Appellee.

No. 152

MOTION TO ADVANCE AND BRIEF IN SUPPORT OF MOTION.

TIMOTHY E. TARSNEY,
Corporation Counsel,
Solicitor for Appellants.

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MOTION.

Complainants and appellants, by Timothy E. Tarsney, their attorney, comes and respectfully moves that the above entitled cause may be advanced on the call, and order of the docket, and the earliest practicable day assigned for its hearing, for the following reasons:

First. Because the cause, as shown by the record, is one of great public interest and importance.

This motion is based upon the abstract of record, filed herein.

TIMOTHY E. TARSNEY,
Corporation Counsel,
Solicitor for Appellants.

BRIEF.

The defendant street railroad company acquired its rights, privileges and franchises by assignment and purchase from the Detroit City Street Railway Company, the Grand River Street Railway Company, the Dix Avenue Railway, and the Highland Park Railway, which said last named companies were all organized under the provisions of chapter 94, Howell's Statutes of the State of Michigan, being section 3495, etc. This act was originally passed in 1855, and did not contemplate the construction of street railways. February 2, 1861, the Legislature amended the act by adding thereto sections 33 and 34, as follows: "It shall be competent for parties to organize companies under this act to construct and operate street railways in and through the streets of any town or city in this State. All companies formed for such purpose shall have the exclusive right to use the same; provided, however, that no such company shall be authorized to construct a railway under this act, through the streets of any town or city, without the consent of the municipal authorities of said town or city, and under such regulations and upon such terms and conditions as the city authorities may from time to time prescribe." Laws '61, pages 11 and 12.

This continued to be the sole provision upon the subject of street railways under this act, until March 27, 1867. Laws '67, p. 257, at which time section 34 was amended by adding thereto the following: "Provided, furher, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the streets, in such consent or grant named, pursuant to the terms thereof." Howell's Sts., Sec. 3527.

This act was approved March 27, 1867, and has remained unchanged until the present day.

November 24, 1862, the common council of the City of Detroit granted to the Detroit City Street Railway Company the franchise of constructing and operating a line of street railway in the City of Detroit. The other companies named afterwards obtained a franchise to construct and operate other lines of street railroad in said city, and in the several ordinances granting such right, there appears this provision: "*The rates of*

fare for any distance shall not exceed five cents in any one car," and in each of said ordinances is the following provision: "It is hereby reserved to the common council of the City of Detroit, the right to make such further rules, orders or regulations as may, from time to time, be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railway."

There is no provision or agreement in any of said ordinances that the rate of fare should continue during the entire period of the franchise of said several companies, unless the same is implied from the language above stated.

The defendant railway company operated under the several franchises assigned to it by the original grantees thereof.

On the 16th day of August, 1899, the common council of the City of Detroit adopted the several ordinances, copies of which are annexed to the bill of complaint as Exhibits "A," "B," "B2," "C," "D," "E," in and by which said several ordinances the common council of the City of Detroit has assumed to fix a rate of fare for the transportation of passengers over the said several lines of railroad other and different from that provided in said original ordinances.

The bill in this case was filed by the street railway company to enjoin the city and its officers from the enforcement of said several ordinances, and an injunction was graned, after hearing in the court below, from which an appeal was taken to this court.

March 5, 1867, an act to provide for the formation of street railway companies was approved, being chapter 95, Howell's Statutes, section 3536, etc. The company is incorporated under this last named act, but, as before stated, its franchise was derived from companies organized under the previous act. By section 13 of the act of March 5, 1867, being section 3548, Howell's Statutes, it is provided that any company, "organized under the provisions of this act, may, * * * construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways, as shall be designated and granted from time to time in the ordinance or ordinances granting such consent." Section 14: "After any city, village or township shall have consented, as in this act provided, to the construction and maintenance of street railways therein, or granted any rights or privileges to such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so granted."

Section 20. "The rates of toll or fare which any street railway may charge for the transportation of persons or property over their road, shall be established by agreement between such

company and the corporate authorities of the city or village where the road is located, and SHALL NOT BE INCREASED, without the consent of such authorities."

It is claimed by the city that the provisions in said several ordinances relative to the rate of fare fixed and determined the rate which the then common council of the City of Detroit deemed to be a reasonable rate for the transportation of passengers, and that it did not constitute an agreement or contract that such rates should be continued during the entire life of the corporate existence of said companies, or to such time as the same might be extended; that the provisions in said several ordinances reserved to the common council the right to make such further rules, orders or regulations as may, from time to time, be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railway, reserved to the common council the right to subsequently regulate the rates of fare, and to determine, from time to time, what was a reasonable rate of charge therefor; that the provision in the organic act above quoted, "That no such company shall be authorized to construct a railway under this act through the streets of any town or city, without the consent of the municipal authorities of such town or city, under such regulations and *upon such terms and conditions as the said authorities may from time to time prescribe*," reserved to said authorities a continuing power of regulation and control of the rates of fare upon the street railways in said city.

It will be noticed that the limitation placed upon the power of the authorities by the amendment of 1867, to *make no regulations or conditions*, whereby the rights or franchises so granted shall be destroyed or *unreasonably impaired*. Bearing in mind the general rule that the use of this right is a public use, and the further rule that the compensation for such use must be *reasonable*, it cannot be said that the regulations of fare at a sum that is *reasonable*, is either a *destruction or an unreasonable impairment of the rights and franchises* of such company. So the right to make changes and new regulations is reserved in the act, its only limitation being that such new regulations must be reasonable and not destructive of the rights granted.

The City of Detroit has a population approximating 300,000. The number of miles of railroad, I believe, is 177; many thousands of passengers ride upon these cars every day, not only the inhabitants of the city, but connected with the radiating lines of defendant's system are divers suburban railroads extending a distance from 40 to 60 miles into the country, which run cars into the city over the tracks of the defendant company.

It is believed that this case presents sufficient public interest to warrant us in respectfully requesting the court to advance

the cause to an early hearing, in view of the fact that it would not be reached in its natural order upon the docket, as I am informed, for nearly a year.

Very respectfully submitted,

TIMOTHY E. TARSNEY,
Solicitor for Appellants.